

(b)(6)



U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

U.S. Citizenship  
and Immigration  
Services

DATE: NOV 29 2013

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

C Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reopen and reconsider the director's decision. The director dismissed the motion. The petitioner appealed that decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO's decision. The AAO dismissed the motion. The matter is now before the AAO on a second motion to reopen and reconsider. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an attorney. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. Subsequent decisions have not disturbed the director's original decision.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions or legal citation to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.



On motion, the petitioner submits a statement contesting the AAO's May 7, 2013 decision dismissing the motion. The petitioner states that "the AAO should have granted the underlying motion and then reviewed the whole case on the merits formally/officially, rather than dismissed the underlying motion."

The AAO dismissed the previous motion because it did not state any new facts or include any new evidence material to the petition. Therefore, the filing did not meet the regulatory requirements of a motion to reopen at 8 C.F.R. § 103.5(a)(2). In addition, the petitioner did not demonstrate that the AAO's appellate decision was incorrect based on the evidence of record at the time of the decision. Therefore, the filing did not meet the regulatory requirements of a motion to reconsider at 8 C.F.R. § 103.5(a)(3). Accordingly, the AAO dismissed the previous motion for not meeting applicable requirements pursuant to the regulation at 8 C.F.R. § 103.5(a)(4).

Furthermore, the AAO's May 7, 2013 decision did review "the whole case on the merits" of the petitioner's national interest waiver claim in pages 3 – 12 of the decision. The AAO specifically and thoroughly discussed the documentary evidence and arguments submitted in support of the petition and determined that the petitioner had failed to establish his eligibility for the national interest waiver. The AAO determined that the petitioner had not submitted evidence demonstrating that his qualifications met the third prong of the national interest waiver test required by *In re New York State Dept of Transportation*, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998). The petitioner's instant motion does not contest the AAO's specific findings regarding his ineligibility for a waiver of the job offer requirement in the national interest of the United States.

A review of the documentation that the petitioner submits with the instant motion reveals no facts or evidence that could be considered "new" under 8 C.F.R. § 103.5(a)(2). In addition, the petitioner has failed to support his motion with any legal argument, precedent decisions, or other comparable evidence to establish that the AAO's May 7, 2013 decision was based on an incorrect application of law or USCIS policy. In addition, the petitioner has not established that the AAO's previous decision was incorrect based on the evidence of record at the time of the decision. Moreover, the instant motion does not contain the statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding as required by the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C). For this additional reason, the motion must be dismissed.

The regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.



**ORDER:** The motion to reopen and reconsider is dismissed, the decision of the AAO dated May 7, 2013 is affirmed, and the petition remains denied.